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No. 02-1097

In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Fifth Appellate District

SUPPLEMENTAL BRIEF IN OPPOSITION RESPONDING TO *AMICUS CURIAE* BRIEFS IN SUPPORT OF FORD MOTOR CO.

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INTRODUCTION

The *amicus* briefs from various automobile manufacturers and business groups that do not like punitive damage awards share several characteristics. First, very little in the briefs is about this case. No *amicus* brief examines the volumes of virtually uncontradicted evidence proving that when Ford rushed the Bronco to gain market share, it knew, before selling the vehicle to the public, that the Bronco could kill seat-belted occupants in a rollover accident. No *amicus* brief disputes the California Court of Appeal's conclusion that the defendant's malicious misconduct amounted to "manslaughter." *Romo v. Ford,* 99 Cal.App.4th 1115, 1150-1151 (2002). Thus, glaringly absent from the *amicus* briefs is any concern about the need for punitive damages in a case in which a defendant knowingly marketed a product that failed its own safety standards and that needlessly killed three people and risked tens of thousands of deaths.

Instead, the briefs are filled with discussion of cases decided around the country, which the briefs imply were wrongly decided. *See, e.g., Amicus* Brief of the Product Liability Advisory Council, et al., at 11 n.9, 15 n.11, 19 n.15; Brief of Twenty Leading Non-Automotive Companies, 8, 12-16, App.B. Perhaps those cases warrant certiorari, when and if it is requested. But unlike *amici*'s characterization of those cases, the Court of Appeal here engaged in exactly the *de novo* review required by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), of each constitutional guidepost set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996).

Second, the briefs are striking in their failure to give any deference to juries, state courts, or state laws. The briefs are filled with hyperbolic references to run-away juries and even run-away courts of appeals. *See, e.g., Amicus* Brief of the Alliance of Automobile Manufacturers, Inc., et al., at 5 (speaking of "run-away verdicts"); *Amicus* Brief of the Product Liability Advisory Council, at 9, 20 (describing the California Court of Appeal as "simple-minded" and speaking of a "run-away jury.") The briefs

show profound disrespect for juries and their role in our constitutional system, for state courts, and for state governments. In this way, the *amicus* briefs are inconsistent with the prior rulings of this Court and with basic principles of federalism.

Many of the briefs propose significant changes concerning when punitive damages should be available and how they should be measured. *Amicus* Brief of the Washington Legal Foundation, et al., at 16 (urging changing the method of calculating punitive damages); Brief of Amici Curiae National Association of Independent Insurers, et al., 4 (proposing new approach to determining when punitive damages are allowed). These arguments are appropriate for lobbying efforts directed to state legislatures; they are not a basis for finding that the state court decision violated due process.

Third, a central theme of all the *amicus* briefs is a call for the Court to clarify the law of punitive damages. *See, e.g.*, *Amicus* Brief of the Product Liability Council, at 2. But subsequent to the submission of these briefs, this Court's decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 2003 WL 1791206 (April 7, 2003), provided much of the clarification *amici* requested. For example, the *amicus* briefs called for this Court to grant certiorari to clarify the standards for determining reprehensibility, evaluating the allowable ratio between punitive and compensatory damages, assessing the relevance of other sanctions, and ascertaining the ability of a jury to award punitive damages for conduct occurring in other states. All of this is found in *State Farm v. Campbell*.[1]

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[1] Respondent Romo is simultaneously filing a separate supplemental brief explaining why the Court of Appeal decision in this case is entirely consistent with *State Farm v. Campbell* and why this recent decision is not a basis for a grant of certiorari or a remand to the California courts.

ARGUMENT

I. CERTIORARI IS UNJUSTIFIED BECAUSE THE COURT OF APPEAL PROPERLY ENGAGED IN *DE NOVO* REVIEW IN CONCLUDING THAT THE PUNITIVE DAMAGE AWARD WAS NOT GROSSLY EXCESSIVE

The most glaring omission from all of the *amicus* briefs is their failure to address the manner in which the Court of Appeal engaged in *de novo* review in this case. After reviewing all of the evidence, the Court of Appeal concluded that it was "frivolous" for Ford to contend that its conduct was not sufficiently "vile" or "loathsome" to support an award of punitive damages. *Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115, 1144-1145 (2002). The Court of Appeal concluded that substantial evidence showed Ford "acted with malice in its design and introduction into the market of the 1978 Bronco." *Id.* at 1146.

The Court of Appeal then conducted the *de novo* review and found: 1) that "defendant's conduct was grossly reprehensible" in that it "placed tens of thousands of lives at risk and actually claimed three such lives in the present case"; 2) the ratio between the punitive and compensatory damages was justified in light of the enormous harms caused and risked by the defendant; and 3) the punitive damages should be compared not just to the civil fines in a case where the conduct was criminal and where imprisonment would be imposed on an individual committing such involuntary manslaughter. *Id.* at 1151.

Under *Cooper Industries,* a key check on punitive damages awards is *de novo* appellate review. That is exactly what occurred in this case.

II. BECAUSE THE COURT OF APPEAL APPLIED THE TEST PRESCRIBED BY THIS COURT, AND SINCE THE DAMAGES AWARDED IN THIS CASE ARE PERMISSIBLE UNDER THIS TEST, THERE IS NO BASIS FOR A GRANT OF CERTIORARI

A. The Court of Appeal Appropriately Found That Ford's Conduct Was "Grossly Reprehensible"

A jury, after lengthy deliberation, found Ford guilty of "malicious conduct," and a Court of Appeal on *de novo* review, found Ford's conduct to be "grossly reprehensible." Nothing in the *amicus* briefs provides a basis for questioning this conclusion.

1. The *Amicus* Brief of the National Association of Independent Insurers, et al., at 4, urges this Court to hold that punitive damages are *per se* unavailable if there "is reasonable disagreement as to the propriety of the defendant's conduct." First, California law, requiring that a jury find by clear and convincing evidence that the defendant acted with malice, already encompasses protection for reasonable conduct. If there were "reasonable disagreement" over the defendant's conduct, then the jury would not find, as it did here by clear and convincing evidence, that the defendant was guilty of "vile," "despicable," and "malicious" conduct disregarding public safety. Ultimately, whether there is "reasonable disagreement" is a factual question to be resolved by the jury, as it was here.

Second, there was no such "reasonable disagreement" in this case. Ford's representative, Al Darold, who worked on the 1978 Bronco, admitted that Ford knew that its roof would fail in a rollover accident. Ex-Ford Vice President Thomas Feaheny said that in his 26 years at Ford, the 1978 Bronco was the "worst" vehicle he ever saw in terms of its lack of rollover crashworthiness. RT 3381:22-3382:1, 3524:13-26. Ford's safety department documents show that Ford knew from studying thousands of accidents and conducting its own tests before producing the 1978 Bronco that it did not have necessary rollover bars and roof

strength and that tens of thousands of lives would therefore be at risk.

2. Many of the *amicus* briefs argue that alleged compliance with existing federal safety standards should always preclude a finding of reprehensibility. *See, e.g.*, Brief of *Amici Curiae*, Alliance of Automobile Manufacturers, at 3, 7; Brief of *Amici Curiae* National Association of Independent Insurers, at 11. First, National Highway Transportation Safety Act (NHTSA) standards were never intended to prevent common law liability. Since its inception in 1966, the NHTSA has provided that: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." *See* former 15 U.S.C. §1379(k), now found at 49 U.S.C. §30103(e). NHTSA standards are "minimum standards" for the sale of an automobile in the United States and were never intended to alter the possibility of "tort liability to encourage development of safety features." *Ketchum v. Hyundai Motors,* 49 Cal.App.4th 1672, 1679 (1996) (citing S.Rep. No. 1301, 89th Cong., 2d Sess., 2720 (1966)).

Second, alleged "compliance" with NHTSA standards is not even an issue in this case because no federal roof crush or stability safety standards applied to the 1978 Bronco when Ford manufactured the vehicle. Those standards would have been irrelevant in any case because Ford knew that the 1978 Bronco would roll over more than other passenger vehicles and that its roof would "fail" in such a rollover. Indeed, Ford disregarded its internal roof strength standards and produced the first passenger sedan in its history with no steel in the roof's "D" pillar. Ford performed no pre-production roof crush tests at all on the 1978 Bronco, and none of the tests that Ford told the NHTSA in 1973 were necessary to assess vehicle stability. *See, e.g.,* RT 2324:4-2325:17; 2401:26-2402:1; 2796:8-2797:23. In fact, Ford had intentionally "misled" the NHTSA about rollover and roof crush hazards to avoid the enactment of such safety regulations. RT 3247:16-3252:17; RT 3258:21-3259:7; 3386:2-3387:1; Exhibit 302:241, p. 2.

3. Many of the *amicus* briefs argue that a finding of reprehensibility is inappropriate because all products involve dangers. The *Amicus* Brief of the Alliance of Automobile Manufacturers, et al., at 2, argues against a finding of reprehensibility by arguing that automobiles "move fast and crash, and severe injuries can occur in them in all kinds of ways even when they are perfectly designed." But the 1978 Bronco, far from being "perfectly designed," was, according to expert testimony at trial, the "worst ever" in terms of rollover crashworthiness. Exhibits 2-4:5; RT: 4922:11-4933:14. The Romo family would have "walked away" if Ford had just met its own internal safety engineering standards.

Similarly, the *Amicus* Brief of the National Association of Independent Insurers, et al., argues that "ultimate safety is not feasible." But "ultimate safety" was never the issue in this case. Deaths could have been prevented from the 1978 Bronco with rollover bars costing between $10 and $12 per vehicle.

4. Many of the briefs argue that the Court of Appeal found reprehensibility solely because deaths were involved in the case. *See, e.g., Amicus* Brief of the Product Liability Advisory Council, at 4-5 (marketing of a product that risked personal injury was determined "reprehensible per se"); *Amicus* Brief of the National Association of Independent Insurers, et al., at 15 (the presence of physical injury or death was used to "automatically put the defendant high on the reprehensibility scale"). This mischaracterizes both the jury's conclusions and the Court of Appeal's analysis. Ford's conduct was not deemed reprehensible *per se* or found reprehensible just because there were deaths. Ford's actions were found to be "malicious" because Ford designed and marketed the 1978 Bronco after removing the basic protections such as a roll bar and a reinforced roof knowing that the unstable vehicle would needlessly cause deaths and serious injuries.

5. Many of the briefs discuss the relationship of punitive damages to safety improvements. The *Amicus* Brief of the Alliance of Automobile Manufacturers, et al.,

at 10, asserts that Ford was punished for changing the design of its Bronco in 1980 showing that "[n]o good deed goes unpunished." The *Amicus* Brief of Mercedes-Benz, USA, at 6, says that punitive damage awards punish innovative safety technology. But the "innovation" in the 1980 Bronco was merely putting steel, a rollbar, in that vehicle's "D" pillar. Placing steel in a roof is not innovation. All Ford passenger sedans, before and after the 1978 Bronco, had steel in the "D" pillars.

Thus, Ford knew before adding steel reinforcement to the roof design on the 1980 Bronco that those safety improvements were needed on the 1978 Bronco. Ford knew that its competitor Chevy had already put two steel roll bars in the 1976 Blazer. Ford's top-level executives reached a "consensus" that such a roll bar was needed on SUVs before the Bronco was produced. Ford even planned on using an "integral roll bar" in the 1978 Bronco and tested a prototype. But Ford took the roll bar design out to rush the Bronco to market and left the "hump" in the roof where the roll bar was supposed to be to make the Bronco "appear" strong. Punitive damages here did not punish innovations as *amici* argue; they were awarded to punish and deter future deliberate disregard of public safety in failing to include basic safety technology Ford knew would save lives.

B. The Court of Appeal Appropriately Found that the Ratio Between the Punitive and Compensatory Damages Did Not Show that the Award Was Excessive

Many of the briefs argued that there is a need for the Court to clarify the appropriate ratio between compensatory and punitive damages. *See, e.g., Amicus* Brief of the Product Liability Council, et al., at 13. This Court provided this clarification in *State Farm;* the Court, in part, stressed that there is no "bright-line" ratio rule and that larger ratios are appropriate where there is particularly "egregious" conduct and where compensatory damages are inadequate or involve a relatively "small amount of economic

damages." 2003 WL 1791206, at 11. Critically important here is that "the level of compensatory damage awards in personal injury cases may be too low in practice to accomplish proper deterrence." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 941-42 (1998). Compensatory damages in wrongful death cases are generally calculated as a survivor's financial loss and this amount generally will not lead to proper deterrence. Philip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities,* 91 Q.J. Econ. 143, 144-45 (1977); *see* William Landes & Richard Posner, The Economic Structure of Tort Law 187 (1987) (damage rules in wrongful death actions undervalue human life). The Court of Appeal emphasized exactly this point in this case and noted that California "tort law, for historical reasons, undervalues noneconomic damages and the compensatory damages award is not a reliable measure of the injury to the victim." 99 Cal.App.4th at 1147.

The *Amicus* Brief of the Product Liability Advisory Council, et al., at 11, asserts that the jury viewed "high compensatory damages [as] automatically justifying high ratios and large punitive damage awards." But that is not at all what occurred in this case. The Court of Appeal stressed that the large punitive damage award was justified because the defendant's conduct was malicious, amounting to manslaughter; the "defendant ignored its own internal safety standards while leaving the Bronco with the appearance of incorporating a roll bar into the vehicle's roof structure"; and "wrongful death compensatory damages do not fully reflect the harm to the victim." 99 Cal.App.4th at 1148, 1151.

C. The Court of Appeal Appropriately Considered Other Sanctions for Ford's Conduct

Some of the *amicus* briefs criticize the Court of Appeal's consideration of other sanctions in this case. *See, e.g., Amicus* Brief of Twenty Leading Non-Automotive Companies at 12 (the lower court in *Romo* "practically

ignored the third BMW guidepost.") To the contrary, the Court of Appeal noted that Ford's "malicious conduct could [have] result[ed] in substantial imprisonment if committed by an individual instead of a corporation," and that California punitive damage jurisprudence gave Ford ample "notice" of the possible penalty. 99 Cal.App.4th at 1151-52. This is a case where due process was satisfied because both substantial civil and significant criminal penalties could have been imposed.

D. The Court of Appeal's Consideration of Ford's Overall Wealth In Determining the Punitive Damage Award is Consistent with the Decisions of this Court and Every Court

Contrary to the assertions in the *amicus* briefs, the Court of Appeal did not uphold the punitive damage award solely based on the wealth of the defendant. *See* The *Amicus* Brief of the Washington Legal Foundation, et al., at 7-15. In fact, the Court of Appeal explicitly acknowledged that "a defendant's wealth cannot be the sole criterion for the size of a punitive damages award." 99 Cal.App.4th at 1152. Thus, Ford's "net worth" was only considered as an additional factor in evaluating the propriety of the award in this case. Such consideration is entirely consistent with this Court's punitive damage decisions.

Further, the *amici* briefs ignore the fact that California law focuses on both "[t]he profits the defendant has gained by virtue of the wrongful course of conduct," as well as "[t]he financial condition of the defendant." Cal. Civ. Code §3295(a). Here, without objection from Ford, the plaintiffs at trial proved that Ford reaped over $1.076 billion in profits from the 1978-79 Bronco.

The *Amicus* Brief of the Washington Legal Foundation, et al., at 4, urges this Court to adopt a new rule that punitive damages be limited to the amount the defendant gained from not putting the additional safety measures in the product. Saving $10-$15 by not using a steel "D" pillar would warrant less punishment than omitting an expensive innovation. Such a rule makes no sense. Moreover,

there is no authority to support such a rule and no basis for finding it to be a constitutional requirement. *Amicus* offers no justification for finding that this radical change in the law is required by due process of law.[2]

Respectfuly submitted,

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[2] The *Amicus* Brief of the Washington Legal Foundation, at al., at 19, also urges this Court to limit punitive damages to conduct that occurred within the state. Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, at 21-28, addresses this issue at length, explaining that Ford waived its right to challenge the admission, use, and consideration of profits on the 1978-79 Bronco; that the jury did not punish out-of-state conduct in this case; and an award which includes consideration of profit from malicious conduct presents no constitutional issue.